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NO. 87-1747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LEONARD R. BENTON,

Petitioner,

V.

STATE OF CONNECTICUT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF CONNECTICUT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Were the defendant's rights under the Fourth Amendment violated where a police officer, in the course of a warrantless surveillance, overheard statements of the defendant without the use of any aural enhancement device, while legally stationed in a neighbor's adjoining duplex apartment?

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STATEMENT OF THE CASE

The respondent agrees generally with the Statement of Facts in the Petition for Certiorari and adds the following corrections and additional facts.

There is no evidence that the walls were "paper thin" (Pet. p. 3). Nor was there any evidence that the Inspector heard "word for word" the conversations. (Pet. p. 3) (See also A-18 earlier claim by the defendant that what was overheard was " 'ambiguous snippets of unrelated conversations.' ").

The defendant does not contest the facts of the Appellate Court decision. In that case the Court noted that "the defendant admitted at the suppression hearing that he could hear conversations occurring in" [the adjacent apartment.] (A-17)

Furthermore, the neighbor "had complained to the police about noise emanating from the defendant's apartment..." (A-17, 110-111).

The Connecticut Supreme Court, citing federal precedent exclusively, affirmed the Appellate Court. In so doing it held:

> Conversations carried on in any type of residence, or anywhere for that matter, in a tone audible to the unaided ear of a person located in a place where that person has a right to be, and where a person can be expected to be, are conversations knowingly exposed to the public, (cites omitted)...The type of dwelling is inconsequential except insofar as its physical attributes increase the vulnerability of its occupants to eavesdropping by the unaided ear. (cites omitted) (A-7)

ARGUMENT

While this case is unique on its facts and the only reported decision of its kind in this country, it is not the proper subject to have the petition granted. It is respectfully submitted that it does not present an issue "often alluded to by lower courts, but consistently left open and unresolved." (Pet. p. 7) for the following reasons.

In *Katz v. United States*, 389 U.S. 347, 351 (1967) it was held that the Fourth Amendment "protects people, not places." However, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment Protection. (cites omitted.)" *Id.* Justice Harlan in his concurrence further stated, "...Statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." *Id.* at 361. The defendant in this case clearly exposed his statements to outsiders in that he knew that he could hear his neighbor's conversations. (A.)

Katz sets forth a two part inquiry, "first that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable' " *Id.* That inquiry requires a factual inquiry into all the relevant circumstances. *Oliver v. United States*, 466 U.S. 170, 177-178 (1984). The Connecticut Appellate Courts conducted the required factual inquiry.

This Court has never held that a person's home is always a place that is subject to Fourth Amendment protections. *Katz, supra.* See also *California v. Ciraola*, 476 U.S. 207 (1986) and *United States v. Karo*, 468 U.S. 705, 714 (1984). Lower federal courts have clearly followed the dictates of *Katz* and recognized that what "a person knowingly exposes to the public... is not a subject of Fourth Amendment protection." *Katz, supra* at 351.

The Petitioner claims in his Petition that the "decision...simply cannot be reconciled with federal decisional law in the subject..." and "...rule adopted...has been expressly rejected in the past by federal courts as 'overly broad' " (Pet. p. 11). The Petitioner provides no case references for such claims and as pointed out above the Connecticut Supreme Court properly followed the federal decisional law on the subject.

In *United States v. Martin*, 509 F.2d 1211, 1214 (9th Cir.), cert. denied, 421 U.S. 967 (1975) the Court held, "Eavesdropping from a place where [an] officer has a right to be is a long-accepted technique of crime detection, not outlawed by the Fourth Amendment. If [the defendant] had talked loud enough to be overheard his expectation of privacy would be gone." This is the general rule that has been followed by the federal Circuits that have addressed the issue. *United States v. Mankani*, 738 F.2d 538, 543 (2d Cir. 1984); *United States v. Wheeler*, 641 F.2d 1321, 1324 (9th Cir. 1981); *United States v. Agapito*, 620 F.2d 324, 330-31 (2d. Cir.), cert. denied, 449 U.S. 834, 101 S.Ct. 107, 66 L.Ed.2d 40 (1980); *United States v. Jackson*, 588 F.2d 1046, 1053, reh. denied, 591 F.2d 1343 (5th Cir.), cert. denied, 442 U.S. 941, 99 S.Ct. 2882, 61 L.Ed. 2d 310 (1979); *United States v. Ortega*, 471 F.2d 1350, 1361 (2d Cir. 1972), cert.

denied, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973); *United States v. Muckental*, 584 F.2d 240, 245 (8th Cir. 1978); *Ponce v. Craven*, 409 F.2d 621, 624 (9th Cir. 1969), cert. denied, sub nom. *Ponce v. California*, 397 U.S. 1012 (1970).

The rule has been followed because, "The risk of being overheard by an eavesdropper... is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." *Hoffa v. United States*, 385 U.S. 293, 303, reh. denied, 386 U.S. 940 (1967), quoting *Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J. dissenting).

In all of the federal circuit court cases in this area of the law that have sought certiorari to this court certiorari has been denied. *United States v. Agapito, supra; United States v. Jackson, supra; United States v. Martin, supra; United States v. Ortega, supra; Ponce v. Craven, supra; United States v. Fisch*, 474 F.2d 1071 (9th Cir.), cert. denied, 412 U.S. 921 (1973); *United States v. Llanes*, 398 F.2d 880 (2d Cir. 1968), cert.denied, 393 U.S. 1032 (1969). The respondent recognizes, however, that none of the above cited cases are factually similar to this case, which appears to be the only reported decision on multiple unit dwellings in this country.

The Petitioner misreads the decisions of the Connecticut Appellate Courts. He states in his Petition (p. 8) that the Connecticut Courts placed "great weight and emphasis on the absence of physical trespass" and that "unless Gallick were a 'trespasser,' his eavesdropping with the naked ear could not, as a matter of law, violate the Fourth Amendment." (Pet. p. 8 fn. 4) In fact, in a review of all Connecticut court decision there is no mention of trespass at all. Further, the Petitioner clearly does not dispute the fact that Inspector Gallick "was not a trespasser." (Pet. p. 10)

The Connecticut Courts properly followed the overwhelming weight of authority for in an age and time when multiple unit buildings are found in all urban and suburban areas it is unreasonable for the defendant to expect that the occupant of an adjoining apartment will not report suspicious activity to the police who in turn may

occupy that adjoining apartment for surveillance purposes. *United States v. Taborda*, 635 F.2d 131, 138 (2d Cir. 1980); *United States v. Martin*, *supra* at 1214; *Hoffa v. United States*, *supra;* See also *United States v. Hall*, 483 F.2d 193, 198 (9th Cir. 1973) (holding that there is no constitutional protection where a party "makes statements at a time when he has reason to know some third party is, or probably is, listening.").

There is no conflict of this decision with other state or federal appeals courts. While the Connecticut courts have decided important federal law it need not be settled by this Court.

CONCLUSION

The State of Connecticut respectfully represents that there is no conflict of decisions and urges this Court to deny the Petition for Certiorari.

Respectfully submitted,

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